No. 93-912

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In The

Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE AND JANE G. PRENTICE, et al.,

Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION ON BEHALF OF TITLE INSURANCE COMPANY OF MINNESOTA, COMMONWEALTH LAND TITLE INSURANCE COMPANY, AMERICAN TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY, TITLE USA INSURANCE COMPANY OF NEW YORK, NATIONAL ATTORNEYS' TITLE INSURANCE COMPANY, JACK OLIVER, DUANE WUNSCH AND HARVEY POLLACK

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QUESTION PRESENTED

Whether this Court has jurisdiction to review the Wisconsin Supreme Court's interpretation of that state's antitrust law in a lawsuit involving no federal claims or questions.

PARTIES IN THIS PROCEEDING AND RULE 29.1 LIST

The respondents filing this brief are Title Insurance Company of Minnesota, Commonwealth Land Title Insurance Company, American Title Insurance Company, TRW Title Insurance Company, Title USA Insurance Company of New York, National Attorneys' Title Insurance Company, Jack Oliver, Duane Wunsch and Harvey Pollack. The other parties to this litigation are listed in the caption of the Wisconsin Supreme Court decision, Pet. App., pp. 1-2.

Respondent Title Insurance Company of Minnesota is now known as Old Republic National Title Insurance Company and is, directly or indirectly, a subsidiary of Old Republic Title Insurance Group, Inc. and Old Republic International Corporation. Old Republic National Title Insurance Company has no subsidiary with publicly traded stock.

Commonwealth Land Title Insurance Company is a subsidiary of State Title Insurance Company, which is a subsidiary of Reliance Insurance Company, which is a subsidiary of Reliance Group Holdings, Inc., which is a corporation whose stock is publicly traded. No subsidiary of these corporations has publicly traded stock.

American Title Insurance Company is a subsidiary of Fidelity National Insurance Company of Pennsylvania, which is a subsidiary of Fidelity National Financial, Inc. No subsidiary of this respondent has publicly traded stock.

PARTIES IN THIS PROCEEDING AND RULE 29.1 LIST – Continued

TRW Title Insurance Company, Title USA Insurance Company of New York (now known as TRW Title Insurance of New York) and National Attorneys' Title Insurance Company (now known as New York TRW Title Insurance Company) were owned by TRW, Inc., which is a publicly traded company. As of January 10, 1994, each of these respondent corporations was acquired by UTC Financial Corporation, which is not a publicly traded company. None of the respondent corporations has a publicly traded subsidiary.

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JURISDICTION

The petition should be denied because it seeks review of a judgment of the Wisconsin Supreme Court on a matter of state law. This case does not present a federal question within this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Although petitioners assert that the Supremacy Clause of the United States Constitution is implicated, their claims arise under and relate exclusively to state law. There is no issue involving the application of the Supremacy Clause.

STATEMENT OF THE CASE

The petitioners filed this action in Milwaukee County Circuit Court in August, 1989, alleging that the respondents had violated Wisconsin antitrust law, Wis. Stat. § 133.03. Pet. App. at 52-70 (complaint). Their complaint alleges that respondents' participation in a state authorized insurance rating bureau constituted unlawful price fixing. Nothing in the complaint alleges a claim under federal antitrust law or any other federal law.

On October 17, 1990, Judge John E. McCormick of the Milwaukee County Circuit Court issued a memorandum decision dismissing petitioners' complaint. Pet. App. at 71-75. As to the group of respondents known as the MDL Defendants, the circuit court dismissed the complaint on res judicata grounds based on the settlement of multi-district class action litigation in which they were defendants.[1] Judge McCormick dismissed the complaint as to

[1] The respondents submitting this brief in opposition to the petition were not parties to the multi-district litigation and did not move for dismissal on res judicata grounds. The non-MDL defendants, as these respondents were called, moved to dismiss on the grounds of implied exemption and the filed rate doctrine.

all respondents based on the filed rate doctrine. Pet. App. at 74-75.

Petitioners appealed the dismissal of their complaint to the Wisconsin Court of Appeals, which certified the case to the Wisconsin Supreme Court. The Wisconsin Supreme Court affirmed the dismissal, addressing only the application of the filed rate doctrine. Pet. App. at 1-13; *Prentice v. Title Insurance Company of Minnesota*, 176 Wis. 2d 714, 500 N.W.2d 658 (1993). Petitioners moved for reconsideration, and the Wisconsin Supreme Court denied that motion. Pet. App. at 45-47. Petitioners now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

1. This Court Lacks Jurisdiction To Entertain This Petition Under 28 U.S.C. § 1257 Because The Wisconsin Supreme Court's Judgment Is Based Solely on State Law.

This Court should deny certiorari because the decision below represents the Wisconsin Supreme Court's application of state law and does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon*, 447 U.S. 255, 260 n.6 (1980).

The petitioners assert no basis for this Court's jurisdiction to grant the writ beyond the conclusory statement that "[t]his Court has jurisdiction to review the judgment of the Wisconsin Supreme Court under 28 U.S.C. § 1257(a)." Pet. Brief at p. 2. Section 1257(a), however,

limits this Court's jurisdiction to review state court judgments to those involving the adjudication of federal questions:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The prohibition against reviewing decisions not involving federal questions is based on longstanding principles of comity and the general rule that this Court may not render advisory opinions. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

Petitioners do not expressly identify any federal "title, right, privilege or immunity" in question here.[2] It is

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[2] There was no question below of the validity of any treaty or statute of the United States or of the validity of any state statute.

evident that the only possible federal question in this case involves section 1 of the Sherman Act, 15 U.S.C. § 1, and, in particular, the filed rate doctrine announced in *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922), and most recently affirmed in *Square D Company v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

The Wisconsin Supreme Court admittedly adopted the reasoning of *Keogh* in dismissing petitioner's claims pursuant to the filed rate doctrine, but did so as a matter of state, not federal, law. The Wisconsin Supreme Court did not purport to interpret the Sherman Act or to adjudicate any Sherman Act claim, resolving only the state law claims that were before it.

This Court has held that, under certain circumstances, it has jurisdiction to review state supreme court decisions adjudicating state law claims. It has done so, however, only in cases where a state supreme court believed it was compelled by federal law to construe and apply its own law in accordance with federal law. *See e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (Court reviewed the Ohio Supreme Court's interpretation of that state's common law right of publicity because it appeared "at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did"); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n.3 (1981) (Court reviewed South Dakota Supreme Court's interpretation of state unemployment compensation law that was subject to annual review and certification by the Secretary of Labor). *See also In re Northwestern Lutheran Academy*, 290 N.W.2d 845, 847 (S.D. 1980) (South Dakota Supreme

Court interpretation of state law leading to *St. Martin* decision involved the state's efforts to conform state law to federal directives). Those decisions are inapplicable here.

In reaching its judgment in this case, the Wisconsin Supreme Court looked to this Court's decision in *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), for guidance in construing the Wisconsin antitrust provisions. The Wisconsin court said nothing to suggest that it believed itself compelled by federal law to follow *Keogh*. To the contrary, it expressly stated that it looked to federal law merely as a matter of policy:

> This court's *policy* of conforming our antitrust decisions to those of the United States Supreme Court, coupled with this court's history of consistently applying the filed rate doctrine, leads us *to adopt the reasoning* of the United States Supreme Court's decision in *Keogh*.

Pet. App. at 8 (emphasis added).[3] Indeed, the court's decision to "adopt the reasoning" of *Keogh*, rather than simply to "follow" it, demonstrates that the Wisconsin court understood it was free to reject *Keogh*'s reasoning should it decide to do so.

The Wisconsin Supreme Court's analysis of its own application of the filed rate doctrine in other state law

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[3] The Wisconsin Supreme Court's statement that construction of state antitrust laws "is controlled by federal decisions under the Sherman Act," Pet. App. at 8, is an acknowledgement of that policy and cannot be read as a statement that the Wisconsin court was compelled, under the Supremacy Clause, to follow this Court's cases in interpreting state law.

contexts further demonstrates that the court did not believe it was compelled to follow federal antitrust law. The court noted its long history of applying the filed rate doctrine as a matter of state law to bar other claims. Pet. App. at 7. The fact that the Wisconsin Supreme Court also analyzed and agreed with the reasoning of this Court in *Keogh* and *Square D* does not suggest that the Wisconsin Supreme Court felt compelled to follow those decisions. Indeed, had the Wisconsin Supreme Court considered itself compelled to follow *Keogh* and *Square D*, it would have had no reason to review its prior application of the filed rate doctrine to other claims for damages. Pet. App. at 7.

There is nothing in the Wisconsin court's opinion that suggests that it did anything other than what it said it did – look to *Keogh* and *Square D* for guidance in interpreting state antitrust law.[4] This Court has no jurisdiction to review the Wisconsin Supreme Court's interpretation of Wisconsin law simply because the Wisconsin court studied federal law as well as state cases in reaching its decision.

The doctrine of "independent and adequate state grounds" reinforces the conclusion that the petition does

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[4] Both petitioners and respondents noted in briefs to the Wisconsin Supreme Court that the court was not compelled to follow federal law. In their reply brief in the Wisconsin Supreme Court, petitioners argued that the Wisconsin Supreme Court was not compelled to follow *Keogh* and asked rhetorically, "How could an issue so specific to Wisconsin law possibly be 'controlled' by the *federal* courts' interpretation of the Sherman Act?" Pet. App. at 35.

not present a federal question. If the adequacy and independence of a possible state ground is unclear, this Court will presume that the "state court decided the case the way it did because it believed that *federal law required it to do so.*" *Long*, 463 U.S. at 1041 (emphasis added). But when, as here, the state court makes clear in its decision that it chose to use federal cases "only for the purpose of guidance, and [that the federal decisions] do not themselves compel the result that the court has reached," then this Court will not undertake review of the decision.[5] *Id.*

Petitioners' reliance on the Supremacy Clause (Pet. Brief at 2) is simply misplaced. No principle of federal law requires the Wisconsin Supreme Court to interpret the state's antitrust laws in the same way that this Court interprets the Sherman Act. *See California v. ARC America Corp.*, 490 U.S. 93, 101-03 (1989) (federal antitrust laws do not preempt state law). Even if this Court were to grant the writ and determine that the Wisconsin Supreme Court

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[5] *Accord, Michigan v. Long*, 463 U.S. at 1046 n.10 ("an interpretation of state law in our view *compelled* by federal constitutional considerations is not an independent state ground") (emphasis added); *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (state court "assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege"); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) ("This is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' ") (quoting *Zacchini*, 433 U.S. at 568); *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 198 (1965) ("[W]e would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution.") (emphasis original).

incorrectly interpreted federal law, the Wisconsin court would remain free on remand to dismiss petitioners' claim again by departing from its normal policy of conforming its antitrust decisions to those of this Court. Thus, any decision this Court might render regarding *Keogh*'s applicability to the facts of the underlying case would be merely advisory, in direct contravention of the often-stated interpretation of section 1257(a).

2. *Brown v. Ticor Title Insurance Co.* is Irrelevant.

Petitioners state that the Wisconsin Supreme Court's refusal to apply res judicata principles to the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), poses a federal question reviewable by this Court. That is not the case. First, petitioners concede that the existence of the res judicata issue provides no independent basis for granting the writ. Pet. Brief at p. 26, n.22. Second, even where a federal appellate court decision and a state court decision are in direct conflict with respect to "general legal principles or . . . specific state or nonfederal rules," . . . "the [state court] decision, of course, resting as it does upon adequate non-federal grounds, is not reviewable by the Supreme Court." *See* R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* § 4.10 at 181-84 (7th Ed. 1993). Third, the *Brown* lawsuit involves claims under federal antitrust law but contains no claims under Wisconsin antitrust law. 982 F.2d at 389-90. This case involves Wisconsin antitrust claims but not federal claims. The Ninth Circuit did not address the state law issue raised in this case.

For the reasons set forth above, the voluntary adoption of federal cases in the interpretation of state law does not present a federal question. There is no jurisdiction, under § 1257(a) or otherwise, to review the Wisconsin Supreme Court's interpretation of state law. The petition should be denied.

3. The Petition Should Not Be Held Pending Resolution of *Brown v. Ticor Title Insurance Co.*, No. 92-1988.

The Prentice petition need not be held pending disposition of this Court's limited grant of certiorari in *Brown v. Ticor Title Ins. Co.*, 114 S. Ct. 56 (1993). Certiorari has been granted in that case only on the question of the res judicata effect of the settlement by the class in *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633. As petitioners concede, that issue is different than the res judicata question which petitioners seek to raise here. Pet. Brief at p. 6 n.3. There is no reason to reserve a decision on this petition pending a final decision in the *Brown* case.

CONCLUSION

This Court has no jurisdiction to review a judgment of the Wisconsin Supreme Court in a case involving only state law. Therefore, the Court should dismiss the petition for writ of certiorari.

Respectfully submitted,

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